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No. 95-388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, JAMES BISHOP; JOHN BUDDENBERG; GARY COUCH; CRAIG DAVIS; RICKY ANDREWS, THOM KAUMEYER, WESLEY PRITCHETT, and JOHN SIMPSON, Individually and on behalf of all class members,

Petitioners,

vs.

PRO FOOTBALL, INC. d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE SCREEN ACTORS GUILD, INC., AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA FOR LEAVE TO FILE BRIEF AMICI CURIAE and BRIEF OF AMICI CURIAE

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MOTION OF THE SCREEN ACTORS GUILD, INC., THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37.4 of the Rules of this Court, the Screen Actors Guild, Inc. ("SAG"), American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America ("WGA"), hereby move for leave to file the attached brief amici curiae. Petitioners have granted but Respondents have refused consent for SAG, AFTRA, DGA and WGA to file their brief amici curiae in this case.[1]

The question of the existence and content of a new nonstatutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors employed in such productions, and WGA, the union representing writers employed in such productions, as amici, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with multi-employer groups, SAG, AFTRA, DGA and WGA have a broad and important perspective on the issue to be presented to the Court in this case.

The Circuit Court's decision--if allowed to stand--will invite employer collusion and have devastating effects on labor relations throughout the entertainment industry, consequences likely to exceed substantially those which will ensue in the world of sports.

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[1] Attached hereto is the written consent of the Petitioners to the submission of this brief.

The Petition for Certiorari as well as the Amicus Curiae filings of the United States in support of the Petition, in support of the petition for rehearing in the Court of Appeals (Petition, App. E), and in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), each correctly observe that the consequences of the Court of Appeals' decision will not be specific to sports but will extend to other areas of the economy, particularly entertainment. Because of their particular perspective, SAG, AFTRA, DGA and WGA can elaborate on: the structure of labor relations in the entertainment industry; historical instances of the inclination of entertainment enterprises to collude in their markets for talent; and the manner in which such collusion would most likely be fostered by the Court of Appeals' decision in *Brown*.

Because of their particular perspective, their interest in a just resolution of the case, and the singular importance of the issue presented, SAG, AFTRA, DGA and WGA request leave to file the attached brief as amici curiae.

Respectfully submitted,

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January 19, 1996

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE THE SCREEN ACTORS GUILD, INC., THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA

This Brief, in support of Petitioners Antony Brown, *et al.*, is submitted in accordance with Rule 37 of the Rules of this Court. The Screen Actors Guild, Inc. ("SAG"), American Federation of Radio and Television Artists ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America ("WGA") have obtained and file herewith the written consent of the Petitioners to the submission of this brief. Respondents, however, have refused consent. Accordingly, pursuant to Rule 37.4 of the Rules of this Court, SAG, AFTRA, DGA and WGA are filing herewith a motion for leave to file this brief as amici curiae.

INTEREST OF AMICI CURIAE

The question of the existence and content of a new nonstatutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors employed in such productions, and WGA, the union representing writers employed in such productions, as *amici*, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with employers engaged in coalition bargaining, SAG, AFTRA, DGA and WGA have a broad and important perspective on the issue of the proper scope of the nonstatutory labor exemption.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WILL FOSTER COLLUSION AMONG CONGLOMERATE ENTERTAINMENT EMPLOYERS WITH DEVASTATING CONSEQUENCES FOR LABOR RELATIONS IN THE ENTERTAINMENT INDUSTRY

The Petitioners have persuasively delineated the profoundly harmful consequences for labor relations in professional sports which have already ensued from the decision in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and which will be compounded immeasurably by the decision of the Court of Appeals in this case. Petition, at 26 *et. seq*. Petitioners correctly observed that the effects of these decisions are not specific to sports but extend to other industries that rely on a combination of multi-employer bargaining and individual performer negotiations, most notably the entertainment industry. Petition at 26. In its *amicus curiae* brief in support of the Petition in this case, the United States observed that the decision's "potential for mischief" extended, in particular, to the "entertainment industry generally, which has an economic structure similar to professional sports, characterized by multi-employer bargaining units." Brief for United States as Amicus Curiae in support of Petition at 12. Based on perspectives gained through their direct experience representing employees in the primary areas of the entertainment industry, *amici* can readily confirm that the observations of Petitioners and the United States are well-founded.

As in professional sports, the Circuit Court's decision will discourage resolution of labor disputes in the entertainment industry through collective bargaining agreements. First, it is likely to lead to more strikes and lockouts. For entertainment employers, it will create powerful new incentives to use their multi-employer associations as a mechanism for unilaterally and collectively imposing employment terms that severely

restrain competition in their markets for performers, writers, directors and other employees without fear of antitrust violations. For Talent unions, the only recourse would be to strike, which might be ineffective. Strikes, whether or not they are effective, nevertheless, create labor unrest and disrupt the economies of numerous communities.

The harmful consequences of such disruption will be felt, not only by the employees themselves, but by innumerable people who rely for their livelihoods directly and indirectly on the entertainment industry. The Circuit Court's decision--if allowed to stand--will have devastating effects likely to exceed substantially those which will ensue in the world of sports. This is primarily because the entertainment industry, both in terms of numbers of employees and in terms of revenue, is so much larger than professional sports. Whereas professional sports accounts for roughly $5 billion in spectator revenues annually, entertainment (even narrowly defined as spectator entertainment including, *e.g.* film-making, broadcasting, music, live theater, and other artistic performances) accounts for some $100 billion annually.[1] Since 1990, the motion picture industry alone has created more jobs than all of America's motor vehicles and parts manufacturers, pharmaceutical companies, and the hotel industry combined.[2]

The entertainment industry, like the sports industry, is the province of employer conglomerates. There are now four major television networks, six major recording companies, seven major film studios, and eight large book publishers. While there are small, independent firms engaged in producing movies and other entertainment products, more and more of the majors are being welded together into giant multimedia

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[1] *See*, Harold Vogel, *Entertainment Industry Economics* Cambridge University Press (3rd Ed. 1994).

[2] James Aley, *Where the Jobs Are; The U.S. has Added Millions Since 1990--Some in Surprising Places. Look For the Best Ones in Industries where Knowledge Counts, The Time Inc. Magazine Co. Fortune*, Sept. 18, 1995, at 53.

conglomerates, *e.g.* Paramount-Viacom, Fox, Time-Warner, Disney-ABC, which dwarf the National Football League.

Entertainers comprise one of the most extensively unionized occupations in the entire private sector of the American economy. Industry-wide bargaining is virtually universal in most segments of the entertainment industry. Though the key arms of entertainer unionism emerged before the 1935 enactment of the National Labor Relations Act, the NLRA brought about the recognition of the entertainment unions by entertainment employers and governs labor relations in the entertainment industry. Until now, the premise of federal labor legislation has been that employees have a better chance of securing a fair deal from their employers if they bargain collectively rather than individually. The holding that employees lose the right to sell their talents in a competitive market merely by exercising the right to pursue collective bargaining--even after bargaining ends in failure--totally undermines this premise for employees in the entertainment industry.

The structure of labor relations in entertainment closely parallels that in sports. In both contexts, (1) the work force is heavily unionized; (2) industry-wide bargaining is almost universal; and (3) the employers in the entertainment industry collectively wield monopsony power.

Additionally, the entertainment and sports industries are the two areas of the economy where the accepted industry practice is for the collective bargaining agreement to prescribe only a minimum framework of employment terms; because of the vast differences in the available roles for performers and in the skill required to fill such roles (i.e., star performers, featured performers, principal performers, and extras), compensation terms for highly-skilled performers are typically established in these industries through individual negotiations in which employees are routinely represented by "agents." *See H.A. Artists v. Actors' Equity Ass'n*, 451 U.S. 704, 707 (1981). Individual writers and directors also routinely negotiate "overscale compensation" rates which exceed the minimums

in the collective bargaining agreements negotiated by their respective unions.

Management collusion in these individual negotiations can produce huge economic gains for the employers and cause employees to suffer substantial economic harm. To maximize profits, employers will obviously be tempted to restrain competition through collusion in the talent market, if they can do so with antitrust immunity. Entertainment employers have been deterred based on the prevailing understanding that, apart from union agreements, joint action in implementing such terms would be subject to challenge under the antitrust laws. The Court of Appeals' decision will enable conglomerate employers in the entertainment industry to act outside of union agreements in imposing onerous employment terms which would substantially eliminate competition in their talent markets. Because the entertainment industry is many times larger than the sports industry, the potential for monopsony gains realizable through collusion is far larger as well.

II. HISTORY REFLECTS THE INCLINATION OF CONGLOMERATE ENTERTAINMENT EMPLOYERS TO ESTABLISH INDUSTRY-WIDE PRACTICES IN RESTRAINT OF COMPETITION IN THEIR MARKETS FOR ARTISTIC TALENT

The history of labor relations in the entertainment industry provides tangible illustrations of the willingness of entertainment employers to establish industry-wide practices. Circumstances surrounding the birth of the Screen Actors Guild and other entertainment unions in the 1930's provide a leading example. During the Depression, the movie studios agreed among themselves through their own organization, the Motion Picture Producers and Distributors Association, to institute a temporary 50 percent salary cut in current salary rates; a salary cap of $100,000 a year on the amount that could be paid to any performer; and a "right of first refusal" on any offers made to their contract players once the seven-year terms

of their contracts expired. The prospect of such a change in studio-performer relations galvanized organization of the Screen Actors Guild as an independent union.[3]

Assuming that such terms could otherwise be attacked under the antitrust laws, Hollywood in fact sought--and ultimately could not secure--approval from President Franklin Roosevelt pursuant to the National Industrial Recovery Act. Nor has the entertainment industry in the years since assumed that unconsented restraints of the market for employee talent would be immune from antitrust scrutiny. The Screen Actors Guild and other entertainment industry unions have, until now, succeeded--by withholding their agreement--in blocking introduction of industry-wide salary caps, rights of first refusal and other similar employment terms which would hinder individual performers, screenwriters and directors from realizing the full economic returns on their talents, experience, and previous success in the market place.

A salient example of what is likely to occur if the Court of Appeals' decision is allowed to stand involves the net profit formula, a standard component of movie-studio contracts with certain overscale actors and with other overscale creative talent such as authors, screenwriters, directors, producers, etc.[4]

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[3] Another example is the Waldorf-Astoria Agreement of the members of the Motion Picture Association of America ("MPAA") in 1947 not to hire anyone who declined to disavow communist associations. The agreement, a classic group boycott, imposed a fifteen-year blacklist on many leading screenwriters of the time. The scheme could not plausibly have been effectuated other than through collective action of all members of the group. (The recent decision by the Second Circuit cited the *Brown* decision as support to immunize from antitrust challenge an agreement among sports clubs to blacklist a particular employee. *Caldwell v. American Basketball Ass'n*, 66 F.3d 512 (2d Cir. 1995)).

[4] In contrast to a limited group of stars who command a percentage of gross revenues, most performers are relegated to a contingent share of *net* profits. Studio-devised net profit formulae employ a "rolling break even point" which is constantly pushed back as the studio deducts from incoming film revenues an elaborate set of distribution fees, promotional expenses, studio and advertising overhead, interest charges and the like.

Under these formulae, the prospect of actually enjoying a share of net profits is generally illusory.[5]

The detrimental implications of the Court of Appeals decision are highlighted by suggestions of collusion--albeit covert collusion--in the legal challenges to the net profit formula, mounted against individual studios by James Garner and Art Buchwald.[6] The trial court in the *Buchwald* case, however, noted the movie industry's oligopolistic character and cited evidence suggestive of collusion among the movie studios with respect to the net profit formula.[7] The court cited

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[5] At the end of 1994, the movie *Forrest Gump* had reported revenues of $350 million of which its studio, Paramount, had received $190 million. Though production costs were $45 to $50 million, Paramount's books showed that *Gump* remained $60 million in the red. Creative talent associated with the movie--including the author of the book, the film's screenwriter and the co-producers--had all signed standard contracts under which their contingent compensation was tied to net profits as defined by Paramount's formula.

[6] In 1983, James Garner sued Universal City Studios because he had not received a penny of the 37.5 percent of net profits he was supposed to get for starring in *The Rockford Files* for which he had taken less than his normal salary rate. By 1988, when the series had earned $120 million in network and syndication fees, Universal's books still showed the series in the red based on various charges against revenues above and beyond production costs. The suit was eventually settled for a reported $10 million payment by Universal to Garner.

Writer Art Buchwald and producer Alain Bernheim sued Paramount when they received no contingent compensation payments for the movie *Coming to America*, which they allege was based on Buchwald's ideas. A California court determined in 1990 that the standard form contract utilized by Paramount was a contract of adhesion and that seven distinct aspects of the net profit formula were unconscionable. *Art Buchwald v. Paramount Pictures*, No. C706083 (Sup. Ct. of Calif., Cty. of Los Angeles)(1990). The unpublished decision of December 21, 1990 appears as an appendix in P. O'Donnell and D. McDougal, *Fatal Subtraction* at 541 (Doubleday 1992). The parties settled the case before Paramount's appeal was decided.

[7] More recently, the Estate of Jim Garrison filed suit charging that the seven major studios, whose films account for ninety percent of box-office revenues, had conspired to develop and adhere to the net profits formula.

(Footnote continued)

evidence that the Paramount contract was standard in the industry and, moreover, that when one studio revises a provision of its net profit formula, that revision is adopted by the other studios.[8]

The Court of Appeals' decision, if allowed to stand, would be welcomed by the movie industry as a blank check to jointly implement ever more onerous net profit formulations as employment terms of union-represented employees.[9] The logic of the Court of Appeals' decision, combined with that of *Flood v. Kuhn*, 407 U.S. 258, 284 (1972)("state antitrust regulation would conflict with federal policy"), would be

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Estate of Garrison v. Warner Bros., Inc. et al., No. BC139282 (Sup. Ct. of Calif., Cty. of Los Angeles). Garrison, the late New Orleans district attorney who conducted a decades-long investigation to try to uncover a conspiracy behind the 1963 assassination of President John F. Kennedy, wrote a book-length account of his crusade, *On the Trail of the Assassins*, which co-writer/director Oliver Stone and Warner Bros. used as a basis for the movie, *JFK*. Garrison was promised a share of the net profits; the film, which grossed some $200 million at the box office, generated no net profits under Paramount's net profit clause. In addition to contract law claims of unconscionability and lack of good faith and fair dealing, the suit--filed in California state court in November 1995--charges *covert* price fixing and boycotts in violation of California's Business and Professions Act.

[8] P. O'Donnell and D. McDougal at 543.

[9] Gray areas among "employees", "contractors" and "supervisors" invite abuse. Historically, entertainment employers have characterized contingent workers as contractors rather than employees; under the Court of Appeals' decision, they will find advantage in characterizing contingent workers as employees to the extent possible. The Garrison estate was plainly a "contractor" in conveying rights to a book. On the other hand, James Garner was clearly an employee who would be subject to the non-statutory labor exemption were the Court of Appeals' decision to stand. Other categories of workers susceptible to categorization as either contractors or employees or performing a combination of supervisory and nonsupervisory functions may be subsumed within union-represented units of employees. There is no logic for allowing antitrust recourse to some contingent workers and denying it to others based merely on whether they are judged to be "contractors", "supervisors" or "employees".

hailed by entertainment employers as precluding antitrust challenges under state as well as federal law.

The movie studios would be similarly inclined to collude with respect to the sharing of gross profits, now a key feature of star performers' compensation.[10] The Court of Appeals' decision would provide producers with a vehicle for imposing an industry-wide cap on shares of gross profits payable to talent free of possible antitrust liability. The gains to the movie studios from such a device would dwarf the roughly $12 million apparently saved by the NFL Clubs through the Developmental Squad salary fix at issue in *Brown*.

Another example is the matter of residual rights, the talent's share of the revenues derived by the movie studio or other producer when the film or television product is reused in a setting other than the one for which it was originally produced. The emergence of new technologies, beginning with television and now including video, cable, interactive multimedia, and also the sale by the studio of foreign rights continue to increase the dollar value of residual rights. As a consequence, the size of the talent's share in the value of residual rights has been the most contentious issue in Hollywood labor relations for decades and it remains so today. Notably, the right to share in TV residual revenues was first won for film actors by the SAG through a lengthy strike in 1960 led by former President Ronald Reagan when he was president of the SAG, and the same year for screenwriters in their strike. The Court of Appeals' decision would allow the movie studios collectively, without fear of antitrust liability, upon expiration of collective bargaining agreements, to limit or eliminate the share of residual rights payable to talent if negotiations for a new labor contract have reached impasse.

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[10] Based on his individual contract terms, Tom Hanks reportedly realized some $40 million as a share of gross profits on *Forrest Gump* through the end of 1994 and Jack Nicholson similarly made roughly $70 million from *Batman*.

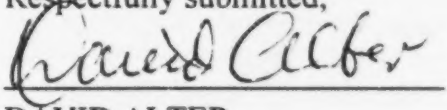
One key difference between sports and entertainment highlights entertainment employees' particular concern with the sports-industry generated version of the exemption at issue in this case. In the world of sports, there is on the surface an arguable justification for some degree of employer collaboration--a justification not shared in entertainment. Sports leagues claim to need common rules and assert those rules must be focused on generating competitive balance to make the product attractive. In the sports context, such arguments may justify a particular labor-market restraint under the "rule of reason", *see, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); they do not in any event warrant invocation of an antitrust exemption. Whatever the weight of these arguments in sports, they have no place whatever in the context of entertainment where the employers are not similarly engaged in leagues.

The consequence of the hands-off approach taken by the Court of Appeals is to give insulation from antitrust challenge to the entertainment world, which is far larger than the world of sports and which moreover presents none of the intrinsic justifications for a degree of employer collaboration.

CONCLUSION

For the reasons stated herein, the Screen Actors Guild, Inc., American Federation of Television and Radio Artists, Directors Guild of America and Writers Guild of America, as amici, respectfully submit that this Court should reverse the judgment below and clarify that terms of employment become exempt from potential antitrust liability based only upon the employees' acceptance as reflected in a collective bargaining agreement and that employment terms collusively imposed by employers after bargaining has failed are not exempt.

Respectfully submitted,



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